No. 15-7

In the Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC.,

Petitioner,

v.

UNITED STATES AND COMMONWEALTH OF MASSACHUSETTS EX REL. JULIO ESCOBAR AND CARMEN CORREA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents' claims under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, are based entirely on alleged regulatory violations. Thus, Federal Rule of Civil Procedure 9(b) required respondents to plead, as a matter of *fact*, the regulations that petitioner allegedly violated. Respondents' complaint failed to allege that petitioner violated 130 Mass. Code Regs. § 429.423(B)(2), the regulation on which the First Circuit relied in reversing dismissal, and respondents never mentioned that regulation at any point during the proceedings below. In adding an allegation that petitioner violated subsection 429.423(B)(2), the First Circuit effectively repleaded respondents' complaint—a departure from the norms of our adversarial system so severe as to warrant summary reversal.

As to the second question presented, dismissal of respondents' complaint would have been affirmed in the Seventh Circuit, which recently rejected the implied certification theory of FCA liability in *U.S. ex rel. Nelson v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015)—a fact that the United States, the real party in interest here, has acknowledged. Respondents themselves admit that *Sanford-Brown* "indisputably . . . conflicts with many decisions of the various Courts of Appeals," Br. in Opp. 27, but deny that it conflicts with the decision below because the First Circuit declined to use the label "implied certification." Implied certification, however, is precisely the theory of liability that respondents advanced, and that the First Circuit applied, here. Respondents never alleged that petitioner expressly certified compliance with any regulations. This has always been an implied certification case, and it is

thus a sound vehicle for resolving the second question presented.

Dismissal also would have been affirmed in the Second and Sixth Circuits, which, while recognizing the implied certification theory of FCA liability, hold that such a claim is only viable if it is based on an alleged violation of a statute, regulation, or contractual provision that is expressly designated a condition of payment. Respondents concede the existence of a circuit split on this issue but argue that it is academic because the regulation that the First Circuit added *sua sponte* was an express condition of payment. This is incorrect. Subsection 429.423(B)(2) is not expressly designated as a condition of payment, and the First Circuit did not hold that it is. Accordingly, this case is a sound vehicle for deciding the third question presented.

If the Court does not summarily reverse on the first question presented, it should grant plenary review of the second and third questions, which involve important and recurring questions regarding the validity and scope of "implied certification" liability under the FCA.

ARGUMENT

I. The First Circuit Salvaged Respondents' Deficient Complaint By Repleading It For Them

Respondents contend that the Court should not grant certiorari on the first question presented because the First Circuit did nothing more than "identify and apply the proper construction of governing law" to an issue properly before it. *See* Br. in Opp. 15–18. This ignores respondents' pleading burden.

The question on appeal was whether respondents' second amended complaint stated a claim for relief. *See* Pet. App. 2. Respondents' only theory of liability was that petitioner violated the FCA by seeking reimbursement while noncompliant with various regulations. Because the FCA was enacted to combat fraud on the government, *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000), "[e]very circuit to consider the issue has held that . . . complaints brought under it must comply with [Federal] Rule [of Civil Procedure] 9(b)." *U.S. ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551–52 (D.C. Cir. 2002).

Thus, Rule 9(b) required respondents to allege, with particularity and as a matter of *fact*, the regulations petitioner violated when seeking reimbursement. *See, e.g.*, *U.S. ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 123–25 (1st Cir. 2013) (applying Rule 9(b) to FCA complaint). Such allegations were a necessary *factual* predicate for respondents' FCA claims, no different from other allegations concerning the "who, what, when, where, and how" of petitioner's alleged fraud. *Id.* at 123 (citation omitted).

Here, although respondents alleged that petitioner violated a Massachusetts regulation (130 Mass. Code Regs. § 429.439) that references various other regulations, Pet. App. 56–58, their complaint failed to allege how petitioner violated that regulation's requirements, Pet. App. 44.

Rather than affirm dismissal because of this failure, the First Circuit salvaged respondents' complaint by effectively repleading the factual predicate for their claims. The court held that the conduct alleged in respondents' complaint violated 130 Mass. Code Regs.

§ 429.423(B)(2), one of the several regulations referenced in section 429.439, Pet. App. 16, even though respondents never once cited any part of subsection 429.423(B)(2) in the district court or on appeal, much less alleged how petitioner violated the regulation. The First Circuit thus contravened the bedrock principle that plaintiffs, not courts, plead a complaint's factual allegations.[1] *See, e.g.*, *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("It is not . . . proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.").

The cases respondents cite are not to the contrary. Petitioner does not dispute that when a "claim is properly before the court, the court . . . retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). But that power is not at issue in this case. Nor is this a case in which the parties stipulated to the meaning of the governing law, *see U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993), or have otherwise colluded to limit the legal issues before the court, *see* Br. in Opp. 17. Likewise, while this Court may have the power to resolve questions not raised by parties in their petitions for certiorari, *see Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320–21 n.6 (1971), an

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[1] Indeed, the district court on remand directed respondents to formally amend their complaint to incorporate "explicitly . . . the regulatory provision that the First Circuit relied on." App. 4a.

appellate court's reinstatement of a dismissed complaint based on a factual allegation *never pleaded* by a plaintiff but instead added *sua sponte* by the court of appeals is a horse of a different color.

Respondents also argue that the Court's supervisory authority applies in civil cases only to the extent necessary to "implement[] a remedy for a recognized right." *See* Br. in Opp. 14. This also fails. In keeping with the Court's longstanding recognition of its "*general* power to supervise the administration of justice in the federal courts," *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 260 (1953) (emphasis added), the Court's rules contain no such limitation, *see* Sup. Ct. R. 10(a). And in practice, the Court regularly exercises its supervisory authority in civil cases.

For instance, the Court routinely grants certiorari to clarify federal practice in civil cases, *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (pleading an antitrust conspiracy), and to prevent marked departures from procedural norms, *e.g.*, *Valley Forge Christian Coll. v Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 470 (1982) (court of appeals adopted "unusually broad and novel view of standing"); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 570–71 (1979) (lower courts "depart[ed] . . . from the procedure normally followed"). This case falls squarely within the path marked by these precedents.

The First Circuit's approach here turns the basic underpinning of our adversary system on its head. *See, e.g.*, *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as

arbiters of legal questions presented and argued by the parties before them."). The Court should therefore summarily reverse. *Cf. Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam) (summarily reversing where the court of appeals improperly weighed evidence on summary judgment).

II. This Case Is A Sound Vehicle For Resolving The Second Question Presented

In *U.S. ex rel. Nelson v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015), the Seventh Circuit rejected the implied certification theory of liability under the FCA. The United States—the real party in interest—filed an *amicus* brief in support of rehearing *en banc* in *Sanford-Brown* that described the resulting circuit split:

> [T]he panel erred in summarily rejecting the "implied certification" theory of FCA liability .... No other court of appeals has rejected the implied certification theory of liability. Indeed, with the exception of the Fifth, Eighth and Eleventh Circuits, every other court of appeals has adopted some variant of that theory, recognizing that a claim may be "false or fraudulent" under Section 3729(a)(1) even if it contains no false statements on its face where it impliedly but falsely represents that the defendant complied with a requirement material to payment.

App. 20a–21a (Brief for the United States as *Amicus Curiae* in Support of Rehearing *En Banc* at 13, *U.S. ex rel. Nelson v. Sanford-Brown, Ltd.*, No. 14-2506 (7th Cir. July 9, 2015), ECF No. 61) (citing cases, including *U.S. ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 387 (1st Cir. 2011)).

Thus, the Seventh Circuit broke with its sister circuits when it unequivocally "decline[d] to join" the "number of . . . circuits [that] have adopted this so-called doctrine of implied false certification," and in doing so noted that "before today this doctrine was 'unsettled' in this circuit." *Sanford-Brown*, 788 F.3d at 711–12 & n.7. This was not mere "dicta," and it was neither "unclear" nor "obscure." Br. in Opp. 25–27.

Respondents attempt to downplay *Sanford-Brown*, arguing that it was "not a Medicaid case." Br. in Opp. 24. But *Sanford-Brown*'s rejection of implied certification did not exempt Medicaid cases from its reach, and respondents ignore the Seventh Circuit's statement that its holding was "[c]onsistent with *Momence*'s foreshadowing." *Id.* at 711 (citing *U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 712 (7th Cir. 2014)). *Momence* was a Medicaid case. *Momence*, 764 F.3d at 712.[2]

Respondents ultimately concede, as they must, "*Sanford-Brown*'s conflict with the opinions of almost all of its sister Courts of Appeals." *See* Br. in Opp. 28. Respondents argue that nevertheless, this case does not present an appropriate vehicle to address the conflict because the First Circuit "disclaimed reliance" on the implied certification theory. *Id.* at 2, 19. This is incorrect.

The First Circuit has rejected labels used by other Circuits to categorize FCA claims, including "express certification" and "implied certification." Pet. App. 17

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[2] Respondents also suggest that *Sanford-Brown* did not reject implied certification, speculating that "the Seventh Circuit may have only intended to reject the doctrine in the case before it." Br. in Opp. 27. Nowhere does *Sanford-Brown* actually say this.

n.14 (citing *Hutcheson*, 647 F.3d at 385). But while the First Circuit has eschewed such labels, respondents ignore the First Circuit's test, as described in its decision below: "We ask simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." Pet. App. 13.

This is an "implied certification" test, regardless of how it is labeled. Indeed, as the United States observed in *Sanford-Brown*, the First Circuit is among the circuits recognizing the implied certification theory. *See* App. 21a (citing *Hutcheson*). Here, respondents *have never alleged* that petitioner somehow expressly misrepresented compliance with any regulations when it submitted claims for reimbursement. Respondents' theory has always been that petitioner implicitly certified compliance with regulations. After *Sanford-Brown*, the Seventh Circuit would have affirmed dismissal of respondents' complaint.

III. This Case Is A Sound Vehicle For Resolving The Third Question Presented

In those circuits that recognize implied certification claims, there is a split concerning whether such claims can proceed where the statute, regulation, or contractual provision allegedly violated is not expressly designated a condition of payment. Pet. 18–20. Respondents do not seriously dispute the existence of this split or that the First Circuit is on one side of it, having held that conditions of payment need not be expressly designated. *See Hutcheson*, 647 F.3d at 386–88; Pet. App. 13.

1. Respondents instead argue that the third question presented is "academic" because the First Circuit

determined that the regulation at issue here (130 Mass. Code Regs. § 429.423(B)(2)) was "expressly" designated a condition of payment. Br. in Opp. 29. Respondents rely on the First Circuit's statement that "the provisions at issue in this case clearly imposed conditions of payment." *Id.* at 30 (citing Pet. App. 15).

As an initial matter, whether something is "clearly" a condition of payment is different from whether something is "expressly designated" a condition of payment. *See* Pet. App. 13 ("Preconditions of payment, which may be found in sources such as statutes, regulations, and contracts, need not be 'expressly designated.'" (quoting *Hutcheson*, 647 F.3d at 387–88)).

More importantly, subsection 429.423(B)(2) does not state on its face that it is a condition of payment. Rather, the First Circuit held that compliance with a *different* regulation, 130 Mass. Code Regs. § 429.439, is an express condition of payment because it states that "[s]ervices provided by a satellite program are reimbursable only if the program meets the standards described below." Pet. App. 56. Subsection 429.439(C) in turn states that a clinical director "must meet all of the requirements in 130 Mass. Code Regs. § 429.423(B)." *Id.* at 57. Those "requirements" are set forth in subsection 429.423(B)(1), which provides, *inter alia*, a clinical director's licensure and experience requirements—matters not at issue in this case.

The First Circuit instead looked to subsection 429.439(B)(2), which contains a nonexhaustive list of job duties of a clinic director, including items such as establishment of a staffing schedule and staff job descriptions, alongside "overall supervision" of staff. Although this incomplete list of job functions does not set

forth the "requirements" contemplated by 130 Mass. Code Regs. § 429.439(C), the court nonetheless concluded that such functions were conditions of payment sufficient to support an FCA claim. The effect of this cut-and-paste reasoning was to find an implied condition of payment in subsection 429.423(B)(2), a result which would not have occurred in the Second and Sixth Circuits. *See* Pet. 25–29; *cf. U.S. ex rel. Hobbs v. Medquest Assocs.*, 711 F.3d 707, 715 (6th Cir. 2013) ("A conclusion that compliance with the supervising-physician requirements is a condition of payment is only possible by weaving together isolated phrases from several sections in the complex scheme of Medicare regulations.").

2. Respondents attempt to re-frame the third question presented by suggesting that it turns on questions of state, not federal, law. Br. in Opp. 21, 32–34.[3] This is meritless, as the third question presented addresses when implied certification claims are viable under the FCA—plainly a question of federal law. It is irrelevant that an alleged state, as opposed to federal, regulatory violation is the basis for respondents' FCA claims.

Of course, the antecedent question here is whether subsection 429.423(B)(2) *expressly* makes compliance a condition of payment. On its face, it does not. And as discussed above, the First Circuit did not hold that it does. Thus, this Court need not disturb the First Circuit's interpretation of that regulatory provision to decide the third question presented and reverse.

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[3] Although respondents do not differentiate among the three questions presented, this argument has no conceivable bearing on the first and second questions.

3. Respondents contend that a recent regulatory revision renders the third question presented irrelevant by making compliance with 130 Mass. Code Regs. § 429.424 an express condition of payment. Br. in Opp. 34-36. The First Circuit's reversal, however, was based on a different regulation, 130 Mass. Code Regs. § 429.423(B)(2), which was not affected by the regulatory revision cited by respondents. That section 429.424 may have been amended to expressly provide that it is a condition of payment does not change the fact that subsection 429.423(B)(2) is not an express condition of payment.

In any event, even if the 2014 revisions to 130 Mass. Code Regs. § 429.424 had any relevance here, respondents' allegations long antedate the 2014 revisions to section 429.424 they tout, which had an "[e]ffective" date of "March 27, 2014." 2014 Mass. Reg. 357789 (Apr. 11, 2014). The 2014 revisions, as a substantive regulatory change,[4] have no retroactive effect

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[4] Respondents argue, based on the agency transmittal letter, that the 2014 revisions were a mere "clarification" of existing law. But the full passage from the transmittal letter (only partially quoted by respondents) states: "These changes include *clarification* of 'crisis intervention' services as 'psychotherapy in crisis' services, *and specifying* [in section 429.424] the types of staff members, including psychiatric nurse mental health clinical specialists, who are authorized to provide mental health services for which mental health centers may bill." Memorandum from Kristin L. Thorn, Medicaid Dir., to Mental Health Centers Participating in MassHealth 1 (Apr. 2014), http://www.mass.gov/eohhs/docs/masshealth/transletters-2014/mhc-47.pdf (emphasis added). The 2014 revisions went further than merely "clarifying" existing law because they "specified" which types of staff members could perform billable services. In addition, the transmittal letter indicates that the regulations implement a statutory change bearing only on services provided on or after January 1, 2014.

here. *Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 908 N.E.2d 740, 752–53 (Mass. 2009) (noting that "a regulatory change affecting substantive rights generally only applies prospectively" and concluding that a regulation did not apply retroactively where amended regulations "effectively impose a new liability on [petitioner]" (citation omitted)).

CONCLUSION

The Court should grant the petition for certiorari.

October 2015

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA and THE COMMONWEALTH OF MASSACHUSETTS, EX REL JULIO ESCOBAR and CARMEN CORREA, ADMINISTRATRIX OF THE ESTATE OF YARUSHKA RIVERA,	)	**No. 1:11-CV-11170-DPW**
Plaintiff,	)	
vs.	)	
UNIVERSAL HEALTH SERVICES, INC.,	)	
Defendant		

BEFORE: THE HONORABLE
DOUGLAS P. WOODLOCK

STATUS AND SCHEDULING CONFERENCE

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THE COURT: * * *

I had filed, and Mr. Lovett was concerned about it, the Third Amended Complaint, just because I set an outside time for that. But it seems in order. The only issue I guess I have is, because I have not read it carefully -- but I do not want any more Motion to Dismiss practice; we are ready to go I think on this -- it incorporates the First Circuit's basis for rejecting dismissal here.

Is that agreed by the parties?

MR. PEARLSTEIN: Yeah, with this one caveat, and I've already talked about this with Mr. McCue. He has actually named the wrong defendant, and, rather than filing a Motion to Dismiss, we've provided him with the correct defendant's name, and so we'd be amenable to substituting that.

THE COURT: But in terms of the regulatory provision that the First Circuit relied on, it is embedded now explicitly in the Complaint?

MR. PEARLSTEIN: Yeah, so I think that's right. The only caveat is we just received this Third Amended Complaint last night, but I don't anticipate filing a –

THE COURT: All I would ask is you is that you both talk together to be sure that it incorporates that. What I do not want left in the case is a suggestion that there is something new that has not been developed. So, if it is in the Complaint, that is terrific, and if there is some question about who the actual defendant is, work it out, but I would like to get to setting up a schedule for you or the schedule that you have asked for yourselves.

So, on the assumption that there may be a fourth amended complaint just to tidy up this last set of

details, I want that done before August 14th. I think it could probably be done almost immediately, but, in any event, before August 14th. Then, the defendants will respond within 30 days of the filing of that, and it is going to be an Answer, not a Motion to Dismiss.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14-2506

UNITED STATES OF AMERICA
ex rel. BRENT M. NELSON,

Plaintiff-Appellant,

v.

SANFORD-BROWN, LIMITED, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF WISCONSIN

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE IN SUPPORT
OF REHEARING EN BANC**

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INTRODUCTION AND SUMMARY

The panel's decision is premised on a fundamental misunderstanding of the False Claims Act (FCA) and threatens to significantly impair enforcement of the statute in the many federal funding programs that involve a multi-step process for obtaining benefits from the government. The panel held that a person is not liable under the FCA where he initially promises to comply with prerequisites to receive federal funds and then knowingly violates those requirements while submitting claims (or causing others to submit claims) for payment to the government, so long as that person initially intended to keep his promises. By limiting FCA liability to circumstances where a person knowingly makes misrepresentations at phase-one of a multi-stage benefit process, the panel's decision immunizes fraud once a person has initially established his eligibility to obtain federal funds. That result is contrary to this Court's prior decision in *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), the text and purpose of the FCA, and decisions by numerous other courts of appeals holding that a claim is "false" under the FCA where it impliedly (but untruthfully) represents that the claimant has satisfied all relevant conditions of payment. For these reasons, the United States respectfully submits this brief in support of appellant's petition for rehearing en banc.

The panel's decision cannot be reconciled with this Court's prior decision in *Main*. As in this case, *Main* involved statutory requirements for the receipt of funds under Title IV of the Higher Education Act. *See* 20 U.S.C. § 1094(a) (conditioning the "initial and

continuing eligibility" of institutions upon compliance with requirements). This Court reversed the dismissal of FCA claims premised on knowing violations of one of these requirements – the prohibition on paying "incentive compensation" to student recruiters – rejecting the district court's holding that the claims submitted to the Department of Education were "not false, because they do not repeat the assurance that the University abides by the rule against paying contingent fees to recruiters." *Main*, 426 F.3d at 916. This Court explained in *Main* that a "University 'uses' its phase-one application (and the resulting certification of eligibility) when it makes (or 'causes' a student to make or use) a phase-two application for payment," and concluded that "[t]he phase-two application is itself false because it represents that the student is enrolled in an eligible institution, which isn't true." *Id.*

The panel's decision in this case conflicts with *Main* in several important ways. *First*, the panel's holding that the statutory requirements for the receipt of Title IV funds "are merely conditions of initial participation that must be true at the time the PPA was entered into," Panel Op. at 23, is contrary to *Main's* fundamental premise: that the Title IV requirements (and a university's promises to comply with them) are "integral to a causal chain leading to payment." *Main*, 426 F.3d at 916. *See also United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1176 (9th Cir. 2006) (holding that Title IV requirements are "conditions of payment" because if they were only conditions of participation "an educational institution could flout the law at will").

Second, the panel's holding that a necessary predicate for FCA liability in this context is evidence

that the defendant's phase-one promises of compliance with Title IV requirements were "false when made," Panel Op. at 20-22, is inconsistent with the recognition in *Main* that a university "uses" its initial promises of compliance when it seeks payment or causes others to seek payment. *Main*, 426 F.3d at 916. Because the FCA imposes liability for both making and *using* a false record or statement material to a false claim, 31 U.S.C. § 3729(a)(1)(B), *Main's* conclusion that a university "uses" (*i.e.*, relies upon) its phase-one promises of compliance when it seeks payment demonstrates that the continued truth or falsity of such statements is relevant for purposes of FCA liability. In short, a university may not avoid FCA liability simply because its promises of compliance may have been true when made.

Third, the panel's cursory rejection of the "implied false certification theory" of FCA liability, Panel Op. 26-27, conflicts not only with decisions by every other court of appeals to have ruled on this issue, but also with *Main's* holding that, where a university violates Title IV requirements, a phase-two claim for payment that contains no express false statement on its face is "false because it represents that the student is enrolled in an eligible institution, which isn't true." *Main*, 426 F.3d at 916. Although *Main* did not formally adopt the "implied certification" theory, it endorsed the basic principle recognized by most other courts of appeals: that a claim is "impliedly false," even where it contains no express false statements, where the claimant knowingly failed to satisfy all relevant conditions of payment.

STATEMENT

1. In order to receive federal subsidies through federal student loan and grant programs established under Title IV of the Higher Education Act, a post-secondary educational institution must first enter into a program participation agreement (PPA) with the Department of Education. 20 U.S.C. § 1094(a). Each agreement "shall condition the initial *and continuing* eligibility of an institution to participate in a program upon compliance with" a variety of requirements set forth in the statute. *Id.* (emphasis added) Applicable regulations reiterate that "initial and continuing eligibility" to receive Title IV funds is conditioned upon compliance with these requirements. 34 C.F.R. § 668.14(a)(1). *See also Leveski v. ITT Educ. Services, Inc.*, 719 F.3d 818, 820 (7th Cir. 2013) ("Institutions of higher education must continually certify their compliance with the current Department of Education regulations through program participation agreements in order to receive federal financial assistance award money.").

2. This case involves claims under the False Claims Act against the operator of a chain of for-profit colleges. The *qui tam* relator, Brent Nelson, alleges that defendant Sanford-Brown College ("SBC") entered into participation agreements with the Department of Education in which SBC promised to comply with a variety of Title IV funding requirements, including the incentive compensation ban at issue in *Main*. The relator further alleges that SBC knowingly violated those requirements while nevertheless submitting (or causing others to submit) claims for payment under Title IV that were impliedly false because SBC was not eligible to receive those funds.

The district court granted SBC's motion for summary judgment on the grounds that (1) the funding requirements allegedly violated were not "conditions of payment," and (2) SBC's promises of compliance with those requirements were not false at the time they were made. The court also categorically rejected what it described as an "implied false certification" theory of FCA liability.

The relator appealed, and the United States filed an amicus brief in support of the relator in this Court. The government's amicus brief argued that the district court erred in three distinct ways in granting summary judgment to SBC: (1) by holding that Title IV requirements, such as compliance with the incentive compensation ban, are not "conditions of payment," (2) by holding that SBC could only be liable under the FCA if its promises of compliance were false at the time they were made, and (3) by categorically rejecting the "implied certification" theory of liability, which rests on the common-sense principle that a claim may be "false or fraudulent" under the FCA even if it contains no express false statements on its face.

3. A unanimous panel of this Court affirmed the district court's decision in all respects. The panel held that the relator's claim under 31 U.S.C. § 3729(a)(1)(B) failed because there was no evidence that "SBC entered the PPA in bad faith." Op. 21. Echoing the district court, the panel held that a person is not liable under the FCA unless his phase-one promises of compliance with relevant Title IV funding requirements were false at the time they were made. The panel based this holding exclusively on its reading of this Court's earlier decision in *Main*, asserting that "[t]he outcome in *Main* was dependent on the defendant's mindset when it

entered into the PPA." *Id.* at 20. The panel summarily rejected the government's argument that, although *Main* was a case where the university's phase-one promises of compliance happened to be false at the time they were made, that decision did not purport to limit FCA liability to these circumstances. *See* Op. at 21 (citing *Main* for the proposition "that promises of future performance do not become false due to subsequent non-compliance"). The panel did not address the government's argument (U.S. Br. 17) that 31 U.S.C. § 3729(a)(1)(B) is not limited to records or statements that are false at the time they are made but instead applies whenever a person knowingly makes *or uses* a false statement or record material to a false or fraudulent claim. Instead, the panel simply concluded that, "under *Main*, the relator must establish the defendant's mindset at the time of entry into the PPA." Op. 21.

The panel also held that the Title IV eligibility requirements "are merely conditions of initial participation that must be true at the time the PPA was entered into, not conditions that are prerequisites to payment for the purposes of liability under the FCA." Op. 23. Rejecting the government's argument that "continued lawful receipt of the federal subsidies depends on continued compliance with the PPA," the panel acknowledged that its ruling on this point was directly contrary to the Ninth Circuit's decision in *Hendow*, which held that these same Title IV requirements are conditions of payment. Op. 23. However, the panel nowhere analyzed the statutory and regulatory language the Ninth Circuit relied upon in *Hendow*, which expressly conditions a university's "initial and continuing eligibility" to participate in Title

IV programs on compliance with these requirements. *See* 20 U.S.C. § 1094(a); 34 C.F.R. § 668.14(a)(1). The panel appeared to recognize that a fundamental premise of *Main* was that Title IV requirements are "conditions of payment," *see Main*, 426 F.3d at 916 (stating that compliance with requirements is integral to payment), but nevertheless concluded that this holding was subject to an implicit, temporal limitation, applying only at the time a university initially promised to comply with those requirements, and not thereafter. *See* Op. at 24 (concluding that "violations of Title IV Restrictions after good-faith entry into Title IV [do not] trigger FCA liability").

Finally, the panel summarily rejected the implied certification theory of FCA liability. *See* Op. 25-28. Without analyzing (or even citing) any of the numerous decisions by other courts of appeals that have adopted that theory in whole or in part, the panel simply declared that it would be "unreasonable" and "untenable" to treat compliance with various statutory and regulatory requirements (which could potentially be quite numerous) as "conditions of payment for purposes of liability under the FCA." *Id.* at 26. Citing reservations about the potential breadth of the implied certification theory previously expressed by Judge Manion in *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 711 & n.13 (7th Cir. 2014), the panel refused to join those circuits that have accepted some variant of that theory, stating that it was instead "join[ing] the Fifth Circuit." Op. at 27 (citing *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010)).

DISCUSSION

The panel's decision in this case is wrong and threatens to immunize fraud in many federal programs where a person is required to make phase-one promises or representations in order to establish his initial and continuing eligibility to receive federal funds and later submits claims (or causes others to submit claims) that do not expressly reiterate those earlier promises. As explained below, the panel's decision conflicts in various ways with this Court's prior decision in *Main*, the plain language and evident purpose of the False Claims Act, and numerous decisions by other courts of appeals adopting the implied certification theory of liability in similar circumstances. This Court should accordingly rehear this case en banc.

1. The panel erred in holding that the Title IV requirements are not conditions of payment.

The panel's holding that the Title IV funding requirements are not "conditions of payment" for purposes of FCA liability, Op. 22-25, is contrary to *Main* and the plain language of the Higher Education Act and its implementing regulations, which condition "initial and continuing" eligibility for federal funds on compliance with relevant Title IV requirements. *See* 20 U.S.C. § 1094(a); 34 C.F.R. § 668.14(a)(1).

Although this Court did not specifically characterize the Title IV requirements as "conditions of payment" in *Main*, that is the underlying premise for the Court's decision, which describes the university's phase-one promises of compliance with Title IV funding requirements as "integral to a causal chain leading to payment." *Main*, 426 F.3d at 916. Indeed, the panel in

this case seemed to recognize that *Main* at least implicitly established that Title IV funding requirements are "conditions of payment." Op. at 23-24. Rather than simply following *Main's* guidance, or the Ninth Circuit's express holding in *Hendow*, 461 F.3d at 1176, however, the panel in this case inexplicably held that "those restrictions are merely conditions of initial participation that must be true at the time the PPA was entered into, not conditions that are prerequisites to payment for the purpose of liability under the FCA." Op. 24.

There is no sound basis for the temporal gloss the panel sought to impose on this Court's prior recognition in *Main* that Title IV funding requirements are conditions of payment. If a requirement is a condition of payment at the time a university initially enters a program participation agreement – as *Main* establishes – it cannot thereafter be relegated to some inferior status (*i.e.*, treated as merely a "condition of participation") without some clear indication that Congress did not intend to require continued compliance with that requirement.

The panel suggested (at 24) that the Eighth Circuit's decision in *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791 (8th Cir. 2011), supports its novel approach to this issue. But *Vigil* did not draw any temporal distinctions for purposes of FCA liability. Instead, *Vigil* simply held that the *qui tam* relator in that case failed properly to allege that the regulations allegedly violated would have affected the Department of Education's payment decisions, and thus failed to satisfy the basic pleading requirements of Fed. R. Civ. P. 9(b). *See Vigil*, 639 F.3d at 799-800. Nor does *Vigil* support the panel's erroneous view that the availability

of administrative remedies for regulatory violations precludes FCA claims in the same context, *see* Op. at 27 n.6 (citing *Vigil*, 639 F.3d at 799), a point the Eighth Circuit has since clarified. *See United States ex rel. Onnen v. Sioux Falls Independ. Sch.*, 688 F.3d 410, 414-15 (8th Cir. 2012).[1]

Aside from citing *Vigil*, the panel made virtually no attempt to justify its counter-intuitive conclusion that Title IV requirements change from "conditions of payment" to merely "conditions of participation" after a university signs its PPA. The panel nowhere acknowledged that the statute and its implementing regulations expressly condition a university's "initial *and continuing* eligibility" to receive Title IV funds on compliance with all applicable requirements. *See* 20 U.S.C. § 1094(a); 34 C.F.R. § 668.14 (a)(1) (emphasis added). Nor did the panel recognize that the Department of Education has explicit authority to withhold payment of funds based upon non-compliance with these requirements. *See* 20 U.S.C. § 1094(c)(1)(G); 34 C.F.R. § 668.83. In short, the panel wholly failed to perform the analysis necessary to determine whether a requirement is potentially relevant to the government's payment decision and thus "material" for FCA purposes. *See* 31 U.S.C. 3729(b)(4).

In lieu of the careful examination of relevant statutes and regulations necessary to determine whether a requirement is a condition of payment, *see*

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[1] If there could be any doubt that knowing violations of Title IV requirements provide an adequate basis for FCA liability, an even more recent Eighth Circuit decision has clarified that Title IV attendance and record-keeping requirements are conditions of payment under the FCA. *See United States ex rel. Miller v. Weston Educ., Inc.*, 784 F.3d 1198, 2107 (8th Cir. 2015),

Onnen, 688 F.3d at 414-14 (explaining that this issue "may require inquiry into whether a regulatory requirement was a precondition to the government payment or merely a condition of continuing participation in a government program"), the panel simply noted that "'PPA' is an abbreviation for Program *Participation* Agreement – not Program *Payment* Agreement." Op. 28 (emphases in the original). But such labels cannot be dispositive. As the Ninth Circuit summarized in *Hendow*, there is no difference between conditions of participation and conditions of payment in the Title IV context because "if we held that conditions of participation were not conditions of payment, there would be no conditions of payment at all – and thus, an educational institution could flout the law at will." *Hendow*, 461 F.3d at 1176.

2. The panel erred in holding that a university can only be liable under the FCA if the promises in its PPA were false when made.

The panel's holding that a necessary predicate for FCA liability under 31 U.S.C. § 3729(a)(1)(B) is a statement that was false at the time it was made is also inconsistent with *Main* and the plain language of the FCA. Although *Main* involved allegations that the university in that case never intended to honor the promises made in its PPA, nothing in that decision suggests that liability under the FCA is limited to this situation. The panel thus erred in declaring that "[t]he outcome in *Main* was dependent on the defendants' mindset when it entered into the PPA." Op. 20.

The plain language of Section 3729(a)(1)(B) refutes the panel's conclusion that "the relator must establish

the defendant's mindset at the time of entry into the PPA." Op. 21.[2] That provision imposes civil liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). Section 3729(a)(1)(B) makes clear that it is relevant for FCA purposes whether a statement is false at the time it is *used* to obtain payment, not merely when it is initially made.

There can be no doubt that a university "uses" the initial promises of compliance made in its PPA – which become false if the university violates those requirements – when it seeks payment under Title IV (or causes others to seek such payments) because the university would not be eligible for such funding absent the entry and continued validity of the PPA. As this Court summarized in *Main*, a university "'uses' its phase-one application (and the resulting certification of eligibility) when it makes (or 'causes' a student to make or use) a phase-two application for payment." *Main*, 426 F.3d at 916. Nothing more is required to establish liability under the FCA, and the panel thus erred in requiring proof that SBC's promises of compliance were false at the time they were made and discounting

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[2] The panel compounded the errors in this portion of its opinion by repeatedly describing the necessary proof in terms that improperly require not merely a "knowing" violation of applicable requirements – a term that includes "reckless disregard," 31 U.S.C. 3729(b)(2) – but intentional fraud. *See* Op. at 21 (stating that the relator failed to "prove that SBC entered the PPA in bad faith"); *id.* (stating that the relator needed to show SBC "planned to 'use' the PPA thereafter to submit poisoned (and therefore false) claims for payment").

evidence that these statements were false at the time they were used to obtain payments

The Fifth Circuit's decision in *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648 (5th Cir. 2004), underscores the error in the panel's approach. *Bain* involved the FCA's "reverse false claim" provision, then codified at 31 U.S.C. § 3729(a)(7), which imposes liability upon anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government." In that case, there was a dispute as to whether the "obligation to pay" was fixed and owing at the time the defendant's false statement was made, but the Fifth Circuit concluded that it was not necessary to reach that question because the obligation was plainly fixed by the time the defendant *used* the relevant statement. *Bain*, 386 F.3d at 657. Thus, *Bain* confirms that the relevant inquiry for purposes of a provision of the FCA with language virtually identical to 31 U.S.C. § 3729(a)(1)(B) is not merely whether a record or statement is false when made but also whether it is false when *used* to obtain payment.

3. The district court erred in summarily rejecting the implied certification theory adopted by numerous other courts of appeals.

Finally, the panel erred in summarily rejecting the "implied certification" theory of FCA liability without any meaningful analysis of the common-sense principles on which that theory is based or the many decisions by other courts of appeals that have adopted that theory in whole or in part. No other court of

appeals has rejected the implied certification theory of liability. Indeed, with the exception of the Fifth, Eighth and Eleventh Circuits, every other court of appeals has adopted some variant of that theory, recognizing that a claim may be "false or fraudulent" under Section 3729(a)(1) even if it contains no false statements on its face where it impliedly but falsely represents that the defendant complied with a requirement material to payment. *See, e.g., United States v. Triple Canopy*, 775 F.3d 628, 635-37 (4th Cir. 2015); *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 309 (3d Cir. 2011); *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377, 387 (1st Cir. 2011); *United States v. Science Application Int'l*, 626 F.3d 1257, 1266 (D.C. Cir. 2010); *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 1020); *United States ex rel. Conner v. Salina Regional Health Ctr.*, 543 F.3d 1211, 1217 (10th Cir. 2008); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 414-15 (6th Cir. 2002); *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001).[3]

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[3] The panel's categorical rejection of the implied certification theory without any discussion of relevant decisions or principles is a sharp departure from this Court's prior, cautious approach with respect to this issue. *See Absher*, 764 F.3d at 711 & n.13. The panel's cursory declaration that it would not join those circuits that had adopted the implied certification theory, but instead would "join the Fifth Circuit," Op. 27, illustrates this lack of careful analysis because the Fifth Circuit decision the panel claimed to be "joining" did not reject the implied certification theory but rather reserved judgment on the validity of that theory. *See Steury*, 625 F.3d at 268 (explaining that the court "need not resolve" whether to adopt the implied certification theory "because

In addition to conflicting with decisions in other circuits, the panel's decision also conflicts with prior decisions by this Court effectively recognizing something akin to the implied certification theory of liability (albeit without using that label). For example, in *Main*, this Court explained that the defendant's false promise of compliance with Title IV funding requirements in its PPA renders a phase-two application for payment false, even without any false statement on the face of such a claim, "because it represents that the student is enrolled in an eligible institution, which isn't true." *Main*, 426 F.3d at 916. Likewise, in *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008), this Court upheld a final judgment holding a medical provider liable under the FCA for violating statutory prohibitions on kickbacks and prohibited referrals for health care services, even though the defendant made no express statements regarding his compliance with those laws in its claims for payment, because "the bills sent to the United States omitted this information." *Id.* at 452. Because prior decisions by this Court appear to recognize that a claim for payment can be "impliedly false," rehearing en banc is warranted to correct the panel's cursory and misguided repudiation of the implied certification theory in this case.

CONCLUSION

For the foregoing reasons, this case should be reheard en banc.

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in any event the factual allegations in Steury's amended complaint provide no basis for implying a false certification").

Respectfully submitted,

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